Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
VONAGE HOLDINGS CORPORATION	)	
	)	WC Docket No. 03-211
Petition for Declaratory Ruling	)	
Concerning an Order of the Minnesota	)	
Public Utilities Commission	)	

COMMENTS

DJE Teleconsulting, LLC, by its owner, hereby submits these comments in response to the above-captioned Petition and the Commission's "Public Notice" (DA 03-2952) dated September 26, 2003.[1] These Comments are directed toward the broader issues raised by this and similar petitions -- as well as other proceedings pending before the Commission and the courts -- pertaining to the nature and degree of regulation to be imposed on the furnishing of certain telecommunications service capabilities to the public.

For the reasons explained below, the Commission should institute a *comprehensive* proceeding to address and resolve the many complex issues that will arise from any decision *not* to impose "Title II" regulation on certain services by labeling them "information services" due to their employment of the Internet, in whole or in part, or because of the nature of their underlying physical facilities,

[1] DJE Teleconsulting, LLC, is a provider of consulting and legal services to the telecommunications industry. Its owner has been involved in telecommunications in various capacities for more than thirty years.

specifically, "broadband transmission."[2] The future public interest requires no less. A disjointed, "piece-meal" approach toward regulating these alleged "information services" will not suffice because it simply is too late for the Commission to evaluate them in isolation, as though they are unrelated.

Vonage and others wish to avoid "Title II" regulation despite the fact they are offering services that allow users to intercommunicate between different locations, without any net change in content of what is said and heard or sent and received. Under traditional analyses and long-established precedent, the underlying facilities used to provide these capabilities to intercommunicate – copper wire, microwave, satellite, fiber, etc. – are irrelevant in ascertaining regulatability. This notwithstanding, it appears the Commission is leaning toward adopting positions that employment of the Internet as a transmission medium or the use of certain transmission facilities in furnishing otherwise regulatable services transforms those offerings into something different, even though the telecommunications capability remains the same. This is a radical departure from years of practice and precedent that, co-incidentally, placed all service providers of directly substitutable service offerings on equal footing in terms of their regulation.[3]

Petitioner's and others' desire to avoid Title II regulation is understandable; they wish to escape the heavy costs associated with direct

[2] Broadband transmission includes cable-modem service, as well as wireline and wireless services that accommodate the rapid transmission of large amounts of content, *e.g.,* DSL Service.

[3] For over two decades, the Commission has accorded differing regulatory treatment to entities subject to "Title II" regulation by classifying them either as "dominant" or "non-dominant," but that regulatory approach was based on the market power attributes of service providers, not the nature of the services they provided.

regulation by the Commission and state agencies. If they are successful, they will be regulated, if at all, only *indirectly* under the vagaries of "Title I" of the Communications Act,[4] and they will be beyond the reach of state regulators. Significantly, they also will obtain substantial business advantages over competitors who remain subject to direct federal and state regulation. In this latter regard, there could be no more perverse a result than a regulatory regime that allows some to become superior competitors not because of the merits of their particular offerings but, rather, because of their favorable regulatory status and treatment.

There is nothing *per se* wrong with the result the Commission appears to seek, specifically, to not have to regulate particular services or classes of services and their providers. If it wants to forego imposing "Title II" regulation because it believes the absence of such regulation will encourage greater investment by industry players, will preclude varying and inconsistent state regulation, or simply will result in the avoidance of having to impose oppressive regulatory requirements not considered necessary to protect consumers, the Commission is free to pursue its goal so long as it fairly assesses the likely results of its actions. These include the likely effect of applying asymmetrical regulation to two classes of competitors offering substitutable services in the marketplace, as well as the impact of such regulation on various governmental

[4] In a nutshell, "Title 1" regulation is a holding out by the Commission that it will impose direct regulation on a service only in extreme circumstances. In fact, "Title 1" contains no explicit grant of regulatory authority; it merely establishes the purposes of the Commission, definitions, and internal procedures. In effect, "Title I" regulation is no regulation at all.

policies and programs that apply to those subject to "Title II" regulation.[5] Overall, the Commission will need to determine whether, and how, consumers – large and small, urban and rural -- will benefit from a regulatory regime that treats competing service providers differently and in material ways, and it will need to satisfy itself that the interests of consumers in a vibrant, competitive telecommunications *and* information services environment will be furthered during the coming decades.

In initiating the proceeding proposed herein, the Commission should take into account at least the following considerations. First, it should determine, based on its rules, precedent and a thorough examination of the facts surrounding those offerings that employ the Internet and broadband transmission facilities, whether they really are "information services." In this regard, the recent Ninth Circuit Court of Appeals' rejection of the Commission's decision to treat cable-modem service as an "information service" should serve as fair warning that the Commission cannot realistically achieve its regulatory goals by ignoring that, under its own precedents, "information services" contain a distinct and separable telecommunications component to which "Title II" obligations apply.[6] Second, as noted, the Commission should avoid, at all costs, implementing an asymmetrical approach to its future regulation. This means simply that *all* substitutable offerings, no matter by whom provided or no matter the underlying

[5] These include responsibilities pertaining to intercarrier compensation, numbering and number portability, Universal Service funding, geographic rate averaging and rate integration, TRS, 911 and CALEA.

[6] Simply choosing to label an offering an "information service" -- because doing so is the easiest way to achieve the desired regulatory end under current regulation -- will not do. Not only is that approach likely to result in judicial rejection, it undermines the firm foundations upon which that classification is built.

applications or facilities used to provide them, either should be regulated or *not* regulated under "Title II" -- whichever approach better serves the public interest, taking into account all relevant factors including the impact on consumers, service providers and competition. Finally, in conducting this proceeding, the Commission should strive as best it can to set aside politics, ideologies and other influences that might detract from its creating a regulatory regime that will serve for years to come.

For the above reasons, the Commission respectfully is requested to institute a *comprehensive* proceeding to address the future regulation of substitutable service offerings and thereby avoid taking piecemeal actions that would disserve the public interest by creating delay, confusion, and the disparate regulatory treatment of competing service providers.

Respectfully submitted,

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